**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| THE FUND FOR ANIMALS, et al., | ) Circuit Court Case No. _____ |
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| Appellees/Plaintiffs, | ) |
| | ) |
| v. | ) District Court Case No. 02-2367(EGS) |
| | ) |
| GALE NORTON, et al., | ) |
| | ) |
| Defendants, | ) |
| | ) |
| THE INTERNATIONAL SNOWMOBILE MANUFACTURERS ASSOCIATION, INC., et al., and THE STATE OF WYOMING, | ) consolidated with |
| | ) |
| Appellants/Defendant Intervenors. | ) |
| | ) |
| GREATER YELLOWSTONE COALITION, et al., | ) |
| | ) |
| Appellees/Plaintiffs, | ) |
| | ) |
| v. | ) District Court Case No. 03-0752(EGS) |
| | ) |
| GALE NORTON, et al., | ) |
| | ) |
| Defendants, | ) |
| | ) |
| THE INTERNATIONAL SNOWMOBILE MANUFACTURERS ASSOCIATION, INC., et al., and THE STATE OF WYOMING, | ) |
| | ) |
| Appellants/Defendant Intervenors. | ) |

**AMENDED EMERGENCY MOTION FOR A STAY AND INJUNCTIVE RELIEF AND REQUEST FOR EXPEDITED HEARING**

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**STATUTES AND REGULATIONS**

Pursuant to Fed.App.R. 8(a) and 28 U.S.C. § 1292(a), Appellants, and Defendant Intervenors in the District Court action below, International Snowmobile Manufacturers Association and BlueRibbon Coalition (hereinafter Defendant Intervenors or Appellants) hereby file this *Amended Emergency Motion for a Stay and Injunctive Relief and Request for Expedited Hearing*. Appellant Defendant Intervenors appeal the District Court's denial of a stay of its December 16, 2003, Order and Judgment in Case Nos. 02-2367(EGS) and 03-0762(EGS) in which the Court (1) vacated the March 23, 2003, Record of Decision ("ROD"), 2003 Final Supplemental Environmental Impact Statement ("FSEIS"), and the December 11, 2003, Final Regulations ("Final Regulations") with respect to the Winter Use Plan for Yellowstone and Grand Teton National Parks and John P. Rockefeller Jr. Memorial Parkway ("the Three Parks" or "the Parks"), and (2) re-instated the January, 2001, rule.[1] *Exh. 5 (Court's Memorandum Opinion); Exh. 6 (Stay Order).* Due to the timing of this motion, Defendant Intervenors are not requesting a decision from this Court by a date certain, but instead request this Court make a determination as expeditiously as it is able because implementation of the District Court's Order is already imposing harms on the residents of the Greater Yellowstone Area and these harms increase each day.

Defendant-Intervenors seek a stay because the abrupt imposition of the Court's Order less than a day before the winter season started in the Parks is and will continue to irreparably harm

[1] Snowmobiles have been allowed to use portions of the Parks road system since 1963 (off road use is prohibited) and snowmobiles account for only four percent of annual vehicular traffic in the Parks. The January, 2001 rule phased in a ban on snowmobile use of the Parks road system with a 50% reduction in snowmobile use the first year followed by a ban the following winter. Implementation of this rule was delayed in a November, 2002 rule. The District Court has reimposed the Clinton Administration rule on the 2002 timeline. Defendant Intervenors did not request a stay of the portion of the Court's Order requiring NPS to respond to Bluewater Network's rulemaking petition, as execution of this portion of the Order will not irreparably harm the Defendant Intervenors and residents of the Greater Yellowstone Area.

the Three Parks' gateway communities, local businesses, and visitors. In coming to its decision and causing this irreparable harm, the District Court (1) misapplied the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, by imposing substantive requirements and disregarding the evidence in the record supporting NPS' decision, (2) used the incorrect standard of review, (3) failed to defer to agency expertise and discretion, (4) mis-interpreted the National Park Organic Act 16 U.S.C. § 1, and (5) improperly disregarded changes in cleaner and quieter snowmobile technology. It is clear that a stay is appropriate when the factors of irreparable harm, demonstration of a substantial likelihood of success on the merits, and the public interest in continuing a long established, popular visitor activity are weighed against the complete lack of harm to the Plaintiffs-Appellees.

In response to the Court's inquiries in its December 30, 2003, Order, the Defendant Intervenors state as follows: while Defendant Intervenors are persuaded they could properly proceed under Fed.R.App.P. 8(a) and the authority it provides this Court, in order to simplify this motion procedurally and remove all questions, Defendant Intervenors have filed an interlocutory appeal of the District Court's December 23, 2003, Order denying our request for a stay of judgment. Because that decision is appealable under 28 U.S.C. § 1292(a), the reviewability of the December 16, 2003, Order is not relevant.

## FACTS

### I. The Environmental Impact Statement

On October 31, 2000, the National Park Service ("NPS") released its Winter Use Plan, Final Environmental Impact Statement for the Three Parks (AFEIS@). 65 Fed. Reg. 64986. The FEIS adopted an alternative not considered in the Draft EIS which banned snowmobiles and relied on snowcoaches only, and rejected completely the option of continued snowmobile use

with technological improvements *See Exh. 7 (FEIS, A.R. 28387-28393); Exh. 8 (DEIS).*

**II. The Supplemental EIS**

Pursuant to a litigation settlement, NPS agreed to prepare an SEIS considering new information not included in the 2000 FEIS (e.g., effects of the cleaner and quieter new snowmobiles). *Exh. 9, (2000 Settlement Agreement, A.R. Vol. 34, 77627-77638).*

For the next two years, NPS examined new and additional information, including data on new snowmobile technologies that dramatically reduced emissions and engine noise, the adverse economic impact of banning snowmobiles on the Park gateway communities, and additional studies on wildlife. *See A.R. Vol. 20, 74542, (Draft SEIS Summary at ix-x).* NPS considered several studies that looked at emissions from new commercially available 4-stroke snowmobile and the studies found dramatic emissions reductions, including larger reductions than those predicted in 2000.[2] *Exh. 10 (A.R. Vol. 65, 85256-85283); Exh. 11 (A.R. Vol. 66, 85408-85450); Exh. 12 (A.R. Vol. 62, 85222 at v).* Emissions from operational snowcoaches were also tested and it was found that these machines produce substantially more emissions than snowmobiles. *Exh. 13 (A.R. Vol. 62, 85223-85251) Id. at 85233.* New air quality studies concluded that in 2000: (1) the emissions from snowcoaches and 2-stroke snowmobiles constitute a small fraction of the annual mobile emissions in the Parks, (2) summer Recreational Vehicles emit over eight times more Nitrous Oxides than snowcoaches and 2-stroke snowmobiles combined, and (3) snowcoaches and 2-stroke snowmobiles accounted for less than 6% of the particulate matter

[2] New 4-stroke snowmobiles reduce hydrocarbon (HC) emissions by more than 90%, carbon monoxide (CO) emissions by more than 70% and are approximately 50% quieter. The Astroke@ refers to the number of engine revolutions per engine power output. Traditionally, snowmobiles have been 2-stroke engines, meaning that the engine puts out power every two revolutions. More recently, 4-stroke engine snowmobiles have been developed and, because the engine rotates more times per engine output, the emissions are substantially less.

emitted in the Parks from mobile sources. *A.R. Vol. 49 at 31.*

The Final SEIS was completed in February 2003. *See generally, Exh. 14 (FSEIS, 74542).* The Final SEIS considered and presented six alternatives. *Id. at S-8-S-15 (FSEIS).* NPS then issued a ROD adopting the FEIS preferred alternative with minor modifications. *Exh. 15 (ROD, A.R. Vol. 43, 81461-81510).* The ROD mandated cleaner and quieter snowmobile technology requirements (in the form of a Best Available Technology ("BAT") requirement for snowmobiles entering the Parks) and set the interim emission requirements (reduce HC by 90%; reduce CO by 70%; maximum noise level of 73 dBA). *Id. Exh. 14 at S-8-S16 (FSEIS).* The ROD limits daily snowmobile entries into Yellowstone to 950 snowmobiles per day and requires that 80% of all visitors be led by licensed, commercial, NPS-trained guides, while the remaining 20% can travel without a guide but must be NPS-trained. *Exh. 15 at 81473.* Implementing regulations were not finalized until December 2003.

**III. D.C. Litigation**

In December 2002, FFA Plaintiffs (the Fund for Animals, et al.) filed suit challenging NPS= decisions with respect to the 2002-03 winter season and an alleged failure to respond to a 1999 rulemaking petition. The FFA Plaintiffs amended their Complaint in January and again in March to challenge the 2003 ROD. The GYC Plaintiffs (Greater Yellowstone Coalition, et al.) also filed in March challenging the 2003 ROD. The Federal Defendants filed, among other things, motions to dismiss based in part on lack of ripeness and finality. In September, the District Court consolidated the two cases, denied the motions to dismiss and set the case for briefing and a hearing on November 20, 2003.

At the November hearing, the District Court asked the Federal Defendants for copies of the final regulation as soon as it was available and set a second hearing date for December 17,

2003. The Federal Defendants provided copies of the regulation as submitted to the Federal Register on December 9, 2003 and the final regulation was published in the Federal Register on December 11, 2003. The hearing was rescheduled for December 15, 2003. A hearing was held on December 15, 2003 and the District Court then issued its Judgment and Memorandum Opinion at approximately 7:45 p.m. on December 16.

## ARGUMENT

### I. THE STAY STANDARD

The stay factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed in the absence of a stay; (3) the prospect that others will be harmed if the Court grants the stay; and (4) the public interest in granting the stay. Virginia Jobbers Petroleum Ass'n v. Federal Power Com'n., 259 F.2d 921, 925 (D.C. Cir. 1958). The degree of probability of success needed to justify a stay is inversely proportional to the degree of irreparable injury that would likely result from not issuing the stay. Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985); see also CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995); Washington Metro. Area Transit. Comm. v. Holiday Tours, 559 F.2d 841, 844(D.C. Cir. 1977)("An order maintaining the status quo is appropriate when a serious legal questions is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury to the movant.").

### II. LIKELIHOOD OF SUCCESS ON THE MERITS

Appellants can demonstrate a likelihood of success on the merits because the District Court erred and, contrary to its findings, Park Service considered a full range of alternatives in the SEIS, new research fully supported its new decision, and NPS thoroughly explained its

decision. Accordingly, the District Court erred both in its December 16 Memorandum Opinion and in its December 23 denial of a stay and determination that the Defendant Intervenors could not show a likelihood of success on the merits.

**A. The Administrative Procedure Act**

Although the District Court does not explicitly state that its determination that NPS failed to sufficiently explain its change in decision was based on the Administrative Procedure Act ("APA"), it appears from the cases on which it relies, that that is indeed the basis. *Exh. 5 at 23-31*. The District Court, however, misapplies the APA, fails to provide the required deference to agency discretion, overlooks the considerable evidence in the record demonstrating a change in facts and research, and applies the incorrect standard of review.

**1. The APA Standard of Review**

The APA standard of review is a "highly deferential standard" that "'presumes agency action to be valid.'" International Fabricare Inst. v. U.S. E.P.A., 972 F.2d 384, 389 (D.C. Cir. 1992)(internal citations omitted); 5 U.S.C. § 706(2). The court must affirm the agency's decision if it is "not contrary to law, [] it is supported by substantial evidence and based upon a consideration of the relevant factors, and if [the court] determine[s] that the conclusions reached have a rational connection to the facts found." BellSouth Corp. v. F.C.C., 162 F.3d 1215, 1221 (D.C. Cir. 1999). The agency may not substitute its judgment for that of the agency. Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983). The agency's decision does not need to "be a model of analytic persuasion to survive a challenge." Frizelle v. Slater, 111 F.3d 172, 176-77 (D.C. Cir. 1997), citing, Dikson v. Secretary of Defense, 68 F.3d 1396, 1404 (D.C. Cir. 1995).

### 2. The Balancing Decision

The District Court erroneously presumes that one half of NPS's statutory dual mandate (the conservation mandate) trumps all other considerations in the agency's decision-making process. *Exh. 5.* The District Court appears to base this incorrect determination not on the Organic Act itself, as the District Court explicitly declined to reach the Organic Act issue, but on NPS' interpretation of the Organic Act as it is encapsulated in its Management Policies. The District Court goes on to conclude that, because NPS' decision violates the conservation mandate, the decision is arbitrary and capricious. This is incorrect because the Management Policies are not binding, the Organic Act does not provide that the conservation mandate trumps all other considerations, and the decision does not violate the conservation mandate.

#### a. The Management Policies

The general rule for agency policies is that "legislative rules bind the courts, while interpretive rules or policy statements do not." Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988); see also Jackson Hole Conservation Alliance v. Babbitt, 96 F.Supp.2d 1288, 1296-97 (Wy. 2000). "A binding Policy is an oxymoron." Vietnam Veterans, 843 F.2d at 537. "Basically, the line is drawn in terms of the extent to which the statement fails to 'leave [] the agency and its decisionmakers free to exercise discretion.'" Id. at 536, citing, McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320 (D.C. Cir. 1985). The difference between a substantive rule and a general statement of policy are that a valid substantive rule establishes a "standard of conduct," and is determinative of the issues. Jackson Hole, 96 F.Supp.2d at 1296-97, citing, American Mining Congress v. Marshall, 671 F.2d 1251, 1263 (10th Cir. 1982). Alternatively, the non-enforceable policy statement is designed to guide future decisions and actions taken in exercising agency discretion. Id. These types of policies do

not create any substantive rights in favor of third parties. Id.

By the District Court's own findings, these policies are interpretive of the Organic Act and on their face are broad guidance principles for decision-making within NPS. *Exh. 5 at 25.* The policies do not limit the NPS's exercise of "discretion" in making these decisions and, as a result, are not binding.[3] Moreover, as discussed below (1) the Organic Act does not place the conservation mandate above all other considerations nor (2) does NPS's decision violate the conservation mandate.

**b. The Organic Act Dual Mandate**

NPS is subject to a dual mandate in managing the National Parks: it must provide for conservation of resources and for visitor use and enjoyment. 16 U.S.C. § 1. The Organic Act confers on NPS the duty and discretion to balance the dual mandate. Bicycle Trails Council v. Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996); Sierra Club v. Babbitt, 69 F.Supp.2d 1202, 1246-47 (E.D.Cal. 1999); National Wildlife Federation v. National Park Service, 669 F.Supp. 384, 391 (D.Wy. 1987); Southern Utah Wilderness Alliance v. Dabney, 222 F.3d 819, 826 (10th Cir. 2000). The Organic Act grants broad deference to NPS in the balancing. Sierra Club, 69 F.Supp.2d at 1247; Bicycle Trails, 82 F.3d at 1454; City of Sausalito v. O'Neill, 211 F.Supp.2d 1175, 1207 (N.D. Cal. 2002). Therefore, the Organic Act does not make the conservation mandate more important than all other considerations. As this erroneous conclusion is the basis for finding NPS' action to be arbitrary and capricious, that conclusion is similarly in error.

[3] Further, the District Court failed to address any of these issues and caselaw and instead relied on dicta in a footnote in a case where the issue was not directly presented to the court because the federal agency did not raise the claim that the policies were non-binding. Davis v. Latschar, 202 F.3d 359 (D.C. Cir. 2000).

### c. Conserving the Parks' Resources

Moreover, even if NPS was required to satisfy only the conservation mandate, the agency's decision does so. Permitting a limited number of cleaner and quieter snowmobiles onto the Parks' road system is consistent with the Parks' conservation mandate. Under the 2003 ROD and regulations, the limited number of snowmobiles entering the Parks must reduce HC emissions by 90%, reduce CO emissions by 70%, and generate a maximum noise level of 73 dBA (a reduction of about 50% from previous requirements). Prior to these substantial reductions, snowmobile emissions already accounted for only a small fraction of the mobile source emissions in the Parks. *See e.g. Vol. 49 at 31 (summer Recreational Vehicles alone emit over eight times more Nitrous Oxides (NOX) than the snowcoaches and 2-stroke snowmobiles combined;2-stroke snowmobiles and snowcoaches account for less than 2% of all NOX emissions from vehicles in the Parks, snowcoaches and 2-stroke snowmobiles accounted for less than 6% of the particulate matter emitted in the Parks from mobile sources).* If Park resources are being impaired by vehicle emissions, the culprit is not snowmobiles and most certainly will not be the newer BAT snowmobiles.

Moreover, the District Court's conclusion is inherently contradictory. The District Court first concludes that BAT snowmobiles that drastically reduce emissions (compared to unregulated older snowmobiles that only accounted for a small fraction of the vehicle emissions in the Parks) violate NPS's conservation mandate. *See Exh. 5.* The District Court, however, does not similarly conclude that the significantly more polluting snowcoaches also violate the conservation mandate and actually requires the phase in of snowcoaches. These contradictory conclusions demonstrate the fundamental flaws in the District Court reasoning and application of the law.

### 3. Change in Policy

The District Court similarly erred in evaluating NPS' change in conclusions. The record clearly demonstrates that there was a change in circumstances and the District Court's denial of that fact is bewildering.

When NPS developed the 2000 FEIS there were no commercially available 4-stroke snowmobiles, NPS had only limited information as to when this new technology might become commercially available, and NPS had no research evaluating the emissions or sound levels of production model 4-stroke snowmobiles. *Exh. 7 (FEIS Bibliography).* After the FEIS was released and the 2000 ROD adopted, (1) 4-stroke snowmobiles became commercially available; and (2) hard data on these new snowmobiles regarding actual emissions reductions became available, as opposed to the speculation and theory relied on in 2000. The data showed dramatic emissions reductions, including HC emissions by more than 90%, CO emissions by more than 70%, and particulate matter by more than 90% and that these reductions were more than predicted in 2001. *Exh. 10 (A.R. Vol. 65, 85274-85275; Exh. 11 (A.R. Vol. 66, 85408-85450); Exh. 12 (A.R. Vol. 62, 85222 at v).* NPS also had for the first time in 2001 actual emissions data on snowcoaches, as opposed to the prior guesswork, *Exh. 13 (A.R. Vol. 62, 85223-85251),* and found that even the newest model snowcoaches produce substantially more emissions than snowmobiles. *Id. at 85233.*

The District Court erred when it dismissed this substantial change in circumstances. The District Court states, contrary to the facts and the record, that new snowmobile technology was not "new" and that it was considered in the 2000 FEIS. In 2000, however, the 4-stroke technology was available only in prototype models and emission reductions were speculative as was the date of commercial availability. In sharp contrast, during the SEIS process, the new

snowmobile technology was now commercially available and improvements in emissions were greater than predicted.[4] The change is fundamental and NPS's 700 plus page explanation of the research and changed circumstances was a sufficient explanation of its rationale for the change.

**4. The District Court's Incorrect Application of the Standard**

The District Court incorrectly applies the caselaw and applies a higher standard than is appropriate to NPS' change in decision. The District Court, along with Plaintiffs-Appellees, relies heavily on a precedent supposedly established by Motor Vehicle, 463 U.S. 29. The Court in Motor Vehicle, however, does not establish a higher standard for a change of agency policy as compared to establishing a policy. Id. The Court in Motor Vehicle states that the much lower standard of review applicable to an agency decision to take no regulatory action at all does not apply to a decision to change policy and not regulate. Id. at 41-43. The Court reiterates the deferential arbitrary and capricious review standard that is applicable to agency decisions and explicitly reaffirms that the "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Id. at 43. Moreover, the court will "'uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned,'" id., quoting, Bowman Transp. Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 286 (1974). The Court further recognizes that "an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances." Id. at 42. The Court then remanded the agency's decision because it offered "no reasons at all" for its

4 The District Court overlooks the actual studies done on the new snowmobile and instead relies on a statement made by the EPA in its comments that the emission reductions were as predicted in 2000. *Exh. 5 at 27-28.* First, that was the EPA's conclusion (not NPS) and, second, that conclusion has been contested in the rulemaking proceedings in which the EPA looked at the issue and the correctness of the EPA's methodology is in dispute. Moreover, relying on a comment letter as "evidence" sufficient to refute full research studies contained in the record is highly questionable and demonstrates the weakness of the Court's conclusions.

failure to consider an alternative course of action. Id. at 50. The other cases the District Court relied on support the same conclusion. See Amax Land Company v. Quartermain, 181 F.3d 1356, 1365 (D.C. Cir. 1999); Louisiana Public Service Comm'n v. FERC, 184 F.3d 892, 897 (holding decision arbitrary and capricious because agency reversed its legal position from precedent without explanation or distinguishing it); Bush-Quayle '92 Primary Committee v. F.E.C., 104 F.3d 448, 453 (D.C. Cir. 1997)(invalidating agency decision when it departed from precedent without explanation). The D.C. Circuit explicitly rejected the position that an agency decision that is a break from prior interpretations is entitled to less deference and instead simply held that the agency must provide a reasoned explanation for its change in decision. Amax, 181 F.3d at 1365 n.6. Accordingly, the District Court imposed the incorrect standard of review.

**B. National Environmental Policy Act Claims**

**1. The Statute**

NEPA is a procedural statute that simply requires that federal agencies follow certain procedures before taking actions that will affect the environment but does not require any substantive result. Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996), citing, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). In reviewing an agency=s decision-making process under NEPA, courts first consider whether the agency has considered the relevant environmental factors and taken took a Ahard look@ at the action. Town of Cave Creek v. F.A.A., 325 F.3d 320, 327 (D.C. Cir. 2003); Izaak Walton League of America v. Marsh, 655 F.2d 347, 371 (D.C. Cir. 1981). The court then looks at the decision to determine if the agency=s conclusions are irrational and not arbitrary and capricious and, if they are not, the agency=s decision must be affirmed. Izaak Walton, 655 F.2d at 371 (citations omitted). The court may not substitute its judgment for that of the agency. Id. The

court may not resolve conflicting scientific opinions. Id. at 372; see also Hodges v. Abraham, 300 F.3d 432, 446 (4th Cir. 2002); Manygoats v. Kleppe, 558 F.2d 556, 560 (10th Cir. 1977)(holding that A[i]t is enough that the problems were delineated with great care and informed the Secretary, as decision-maker, of environmental consequences.@); Sierra Club v. Marita, 46 F.3d 606, 621 (7th Cir. 1995)(the fact that there are experts who disagree with the agency=s science does not render the agency=s decision arbitrary and capricious); Webb v. Gorusch, 699 F.2d 1 (4th Cir. 1983).

**2. Adequate Alternatives**

As part of its hard look, an agency is required to look at a Areasonable@ range of alternatives. Natural Resources Defense Council ("NRDC") v. Hodel, 865 F.2d 288, 294-95 (D.C. Cir. 1988). This requirement does not mean that the agency has to examine every possible course of action but rather a range of possible and feasible approaches. Id.; Allison v. Department of Transportation, 908 F.2d 1024, 1031 (D.C. Cir. 1990). The rule of reason also governs the decision to eliminate an alternative from detailed consideration and the extent of discussion required in explaining its elimination. City of Grapevine, 17 F.3d at 1506; Burlington, 938 F.2d at 195. What constitutes a "reasonable" range is determined by the purpose of the NEPA document/action. See Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991)("the goals of an action delimit the universe of the action's reasonable alternatives"). The purpose of an EIS can be significantly narrowed by the use of "tiering." See 40 C.F.R. § 1508.28 (tiering is used to examine narrower issues and focus only on those issues and rely on prior and/or more general environmental statements by incorporating them by reference). Tiering is a method by which the agency looks at a narrower issue than the one addressed in a previous NEPA document and builds off of that prior document in an effort to

avoid duplication of effort and research when it is not necessary. The entire purpose of tiering is to avoid repetition and address a narrower issue than that addressed in the FEIS. See 40 C.F.R. § 1502.20.

Here, NPS examined a reasonable range of alternatives in the SEIS. It examined two alternatives that would implement the 2000 ROD eliminating snowmobiles and three ways to allow and regulate motorized access. *Exh. 14 at S-8-S-11 (FSEIS).* The three other alternatives incorporated a myriad of management and regulation techniques, including more than one method of requiring cleaner and quieter new technology snowmobiles, different snowmobile capacity limits, training requirements for snowmobilers, prohibiting snowmobiling and use of snowcoach only access, closing different areas of the Parks to all access, and altering the season timeframe. *Id.* This is a reasonable range of management techniques and alternatives and satisfies the requirements of NEPA. See NRDC, 865 F.2d at 294-95; Allison, 908 F.2d at 1031. In addition, the six-alternative-SEIS is tiered off the previous seven alternative 2000 FEIS. NPS has clearly satisfied its obligation to consider a reasonable range of alternatives.

It is irrelevant that other management options or techniques can be identified and cobbled together as another alternative that might further the preferences of the Plaintiffs. See Citizens Committee to Save Our Canyons v. U.S. First Service, 297 F.3d 1012, (10th Cir. 2002)(agency not required to analyze alternatives that are impractical or ineffective). A reasonable range of alternatives does not mean a limitless array of every possible course of action. See id.

Furthermore, NPS= decision in 2000 and again in 2003 not to include an alternative that eliminates all road grooming was not a violation of NEPA, but was the only reasonable choice when viewed in the context of both the purpose of the FSEIS and NPS mandates. The purpose of both the FEIS and FSEIS was, among other things, to adopt a winter use program that

provided visitors with a range of winter recreation opportunities. *Exh. 7 at 28379 (FEIS).* NPS explained that it did not consider an alternative that eliminated all grooming (and as a result all motorized winter recreation) because total elimination of all motorized access was not within the scope of the purpose of the action. *Id. at 28463.* NPS satisfied NEPA by explaining why the alternative was rejected and outside the scope. See City of Grapevine, 17 F.3d at 1506; Burlington, 938 F.2d at 195.

Even without the stated purpose of these NEPA documents, the decision not to consider ceasing all road grooming was reasonable. Roads are groomed in the Parks because grooming is necessary for all motorized winter access to the Parks. The District Court=s interpretation would require an alternative that would eliminate almost all winter access to the Parks. Choosing to not include an alternative that eviscerates one of the agency's primary statutory mandates (i.e., visitor use) is not arbitrary and capricious.

The District Court incorrectly dismisses in a cursory footnote the fact that the grooming alternative was considered in the 2000 FEIS and the 2003 FSEIS tiered off of that document. *Exh. 5 at 34 n.15*. The FEIS and NPS's legitimate use of tiering cannot be so easily dismissed, however. Because trail grooming was outside the scope of the new narrower (i.e., supplemental) inquiry, NPS was not required to consider for a second time cessation of trail grooming in order to satisfy its NEPA obligations. The District Court's conclusion that NPS was required under NEPA to consider closures because additional research using road closures would be "helpful" is incorrect. "Helpful" is not the standard for mandating new alternatives and requiring further research. If it were, agencies could never act because there would always be more "helpful" research.

**B. Incorrect Application of NEPA Purposes**

The District Court's decision also incorrectly applies and misinterprets NEPA. As previously noted, NEPA is a procedural statute requiring only a "hard look" by an agency. The District Court instead mistakenly finds a NEPA violation because it believed NPS's decision did not substantively further the Organic Act's conservation mandate and that the 2003 decision was "political."

These two findings are wholly irrelevant to NEPA. NEPA requires the agency to take a hard look at the consequences of and alternatives to its decision. It does not require (1) any substantive decision, or (2) the decision with the least ecological impact.[5] NEPA certainly does not limit an agency's ability to make a politically motivated decision. Executive agencies make politically motivated decisions every day and nothing in NEPA prevents them from doing so.[6]

## III. APPELLEES WILL BE IRREPARABLY HARMED

Appellants will be irreparably harmed if this Court does not issue a stay of the District Court's order. In order to qualify as harm substantial enough to support a stay, the harm must be "irreparable." Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Mere monetary injuries are not sufficient when later compensatory or corrective relief will be available later. Id. When the monetary loss threatens the movant's business or amounts to a substantial percentage of their business, however, that loss may constitute irreparable harm.

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[5] Additionally, the District Court's conclusion of violation is also based on the conclusion that the conservation mandate trumps all other considerations under the Organic Act. As already discussed, this is erroneous.

[6] In fact, the 2000 FEIS and ROD that GYC Plaintiffs-Appellees so vigorously defend was politically motivated. Between the time the Draft EIS and Final EIS came out, Department of the Interior political appointees in the Clinton Administration publicly announced their goal of eliminating snowmobiling in all National Parks. That announced goal rather than any identifiable facts was the basis for the about-face from the Draft EIS (continued snowmobile access was determined not to impair Yellowstone's resources) and the Final EIS (in which it was suddenly determined that any level of snowmobile access would cause impairment).

World Duty Free Americans, Inc. v. Summers, 94 F.Supp.2d 61, 67 (D.D.C. 2000); see also Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

The District Court issued its decision December 16, 2003, at approximately 7:45 p.m. approximately twelve hours before the 2003-2004 winter season began. Overnight it became completely unclear whose reservations would be honored the next morning, whose vacations would have to be canceled and how admittance to the Park would be handled. Because the numbers of permitted snowmobilers was cut in half overnight, visitors who had long planned their visits had no idea that reservations made months ago would not be honored and that they would be turned away at the gates of the Park. Both the substance and timing of this decision are having crippling effects on small businesses, business owners, and the general economy in the Greater Yellowstone Area.

As outlined in detail in the Defendant Intervenors' Motion for a Stay in the District Court, *Exh. 16 at 6-13*, the Greater Yellowstone economies, businesses and the towns themselves depend on the income from snowmobile visitors to the Parks and all of them will be devastated by the eleventh hour imposition of the 2002 rule. Small business owners depend on their income from snowmobile visitors, have invested tens of thousands of dollars in new snowmobile technology, have accepted reservations for this season based on the number of visitors permitted under the 2003 ROD, and will likely have to borrow to meet financial obligations and may face bankruptcy. *See id.; Exhs 1-4.* Since the implementation of the District Court's Order, the disastrous effects have already begun to occur and will continue to increase. *Exhs. 1-4.* The predicted cancellations have begun necessitating the return of deposits and slashing expected income. *Id.*. The expected reduction in permit numbers has been implemented, cutting concessioners' permitted entries up to 60-70%. *Id.* Further, the anticipated job lay-offs have

begun to occur with as much as 80% reductions in staff occurring in businesses. *Id.*

Furthermore, contrary to the District Court's implications, the residents of the Greater Yellowstone Area acted reasonably in moving forward based on the 2003 ROD and should not be made the bear the entire burden of the inappropriate timing of this decision simply because there was ongoing litigation and the possibility of a decision some time in the future. When these small business owners back in April had to make the decision about ordering snowmobiles (without which they would have been out of business this winter under the 2003 ROD), or this summer when they began taking reservations, or this fall when they took deposits and spent necessary funds on preparations for the winter, no one knew that a decision would be made (1) before this winter season, and (2) the night before the season started. Nor was such an outcome reasonably predictable. Moreover, no one knew that the Court would decline to rule on the pending motions to dismiss for ripeness and lack of finality. It was not until September, well after the declarants and others in the Yellowstone gateway communities had made irrevocable commitments of resources, after the Court's scheduling conference, that it became known that the Court planned to make a decision before this winter season started and that it would not rule on the motions to dismiss. Then, again, it was not apparent until the hearing November 20, 2003, that the Court *might* wait until the final regulations were out to issue a decision.[7] It was not until December 16, 2003, that it became certain that the decision would be issued the day before the season started. As discussed above, the timing of this decision is playing a crucial

[7] The Court stated at the November hearing when it scheduled the second hearing that it could still issue a decision before the December hearing. In addition, Defendant Intervenors did not request that the District Court wait until final regulations were issued before issuing a decision applicable to this winter season. The Plaintiffs' claims should have been dismissed as unripe and, even if the District Court declined to dismiss the claims, nothing required it to issue a decision effective before the this winter season started.

role in the economic injuries.

As a result, precipitously halving the number of snowmobiles that may enter the Parks the night before the season begins is having devastating impacts on the local economies and they will be unlikely to recover from these impacts. These irreparable impacts require a stay.

## IV. PLAINTIFFS WILL NOT BE IRREPARABLY HARMED BY A STAY

On the other side of this balancing scale of harms, there are the Plaintiffs who cannot demonstrate harms even remotely approaching those being suffered by Appellants and the other residents of the Greater Yellowstone Area. At most, Plaintiffs can complain of inconvenience. This is simply insufficient.

The Plaintiffs are essentially comprised of individuals who would prefer to visit the Parks without snowmobiles[8] and who claim that they will not (or cannot) visit the Parks while snowmobiling continues.[9] First and foremost, these Plaintiffs will not be harmed at all by a stay because under both the 2003 Final Regulations and the 2001/2002 rule re-instated under the Court's Judgment, snowmobiles will be in the Parks this winter. Second, if emissions are harming these Plaintiffs then they will be more harmed by the failure to issue a stay because under the 2001/2002 regulation, there are no BAT snowmobile requirements. Third, the mere inconvenience of temporarily delaying a winter visit to the Parks while this case is decided on appeal is not on par with the harms being suffered by the residents of the Greater Yellowstone Area and public visitors who will lose their planned and paid for vacations to the Parks. The

[8] *See FFA Motion for Summary Judgment*, Exhs. 12-14, 16-17; *see also GYC Motion for Summary Judgment*, Declarations of Robert Ekey, Steve Thomas, Michael Scott, Tony Jewett, Charles M. Clusen, and Ken Miller. While these Declarants would prefer not visit the Parks if snowmobile access continues, they plan to visit the Parks regardless.

[9] *See FFA Motion for Summary Judgment*, Exhs. 15, 18; *see also GY Motion for Summary Judgment*, Declaration of Betsy Buffington. Betsy Buffington is the only individual claiming that she "cannot" enter the Park due to her health condition.

Plaintiffs' insignificant harm is made more trifling by the fact that for all but one of them, this is simply a matter of choice and preference. A desire to have visitation to the Parks conform to their personal preference is not only not an irreparable harm, it is not a harm at all.

## V. THE PUBLIC INTEREST FAVORS A STAY

The public interest heavily favors protecting local economies, preserving public access to the Yellowstone National Park, preserving a public process and agency decision, and not precipitously and unnecessarily destroying local businesses and economies.

## CONCLUSION

Accordingly, the Appellant Defendant Intervenors have clearly demonstrated that a stay is warranted and that the District Court erred and respectfully request this Court stay implementation of those portions of the District Court's Order that invalidated the 2003 FSEIS, ROD and regulations and re-instituted the 2002 regulation.

DATED: January 2, 2004.

Respectfully submitted,

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## D.C. Cir. Rule 27 Certification

Pursuant to D.C. Cir. Rule 27(f), the Appellant Defendant Intervenors contacted counsel of the other parties. The Federal Defendants do not object to granting the relief requested herein and Defendant Intervenors the State of Wyoming support granting the relief requested. The Greater Yellowstone Coalition and Fund for Animals Plaintiffs-Appellees oppose granting the relief requested.

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## D.C. Cir. Rule 28(A)(1) Statement

The Plaintiffs in Case No. 02-2367(EGS) are the Fund for Animals, the Bluewater Network, the Ecology Center, Walt Farmer, George Wuerthner, Philip Knight, and Richard Meis. The Federal Defendants in Case No. 02-2367(EGS) are Gale Norton, the Secretary of the Interior, Fran Mainella, Director of the National Park Service, and Steven Williams, the Director of the Fish and Wildlife Service.

The Plaintiffs in Case No. 03-0762(EGS) are Greater Yellowstone Coalition, National Parks Conservation Association, Wilderness Society, Natural Resources Defense Council, Winter Wildlands Alliance, and Sierra Club. The Federal Defendants in Case No. 03-0762(EGS) are Gale Norton, the Secretary of the Interior, Fran Mainella, Director of the National Park Service, and Karen Wade, the Director of the Intermountain Region of the National Park Service.

The State of Wyoming, the International Snowmobile Manufacturers Assoc., and the BlueRibbon Coalition, Inc, are Defendant Intervenors in both cases.

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## Certificate of Service

Pursuant to D.C. Cir. Rules, the Appellant Defendant Intervenors hereby certify that the foregoing *Amended Emergency Motion for a Stay and Injunctive Relief and Request for Expedited Hearing* was hand-delivered this 2nd day of January, 2004 to the following parties via courier:

Matthew J. Sanders
United States Department of Justice
Environmental and Natural Resources Division
Appellate Section
601 D Street, NW
Room 87004
Washington, DC 20004

Howard M. Crystal
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Meyer and Glitzenstein
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With the agreement of counsel, the following parties were served with foregoing *Amended Emergency Motion for a Stay and Injunctive Relief and Request for Expedited Hearing* and Exhibits 1-4 via email, and the *Amended Emergency Motion for a Stay and Injunctive Relief and Request for Expedited Hearing* with a complete set of the Exhibits were sent via overnight delivery on January 2, 2004:

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